Lieberman

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TLC Systems and King-Fisher Company

File: B-227842, B-227842.2

Date: October 6, 1987

DIGEST

1. Agency decision to use negotiation procedures in lieu of sealed bidding procedures is justified where the agency intended to conduct discussions with the responding offerors.

2. Procurement need not be set aside for small business where the contracting officer determines that there is no reasonable expectation of receiving offers from two small businesses and making award at a reasonable price.

3. Allegation that specification for fire alarm equipment should have restricted approval of the equipment to Underwriters Laboratory (UL) or Factory Mutual Systems (FMS) is without merit since restricting equipment approval to particular organizations without recognizing equivalents is unduly restrictive and protester has not shown any legal requirement for only UL and FMS approved equipment.

4. Protester's allegation that specification for fire alarm equipment utilizing National Fire Protection Association Standard 72D is unduly restrictive is denied where the agency reasonably supports the specification and the protester has not shown that the restriction is clearly unreasonable.

5. Where protester alleges that specifications contain incongruities and the agency states that it will amend the solicitation in order to eliminate these incongruities, the allegation is academic.

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DECISION

TLC Systems and King-Fisher Company protest the terms of request for proposals (RFP) No. F08637-87-R-0014, issued by the Air Defense Weapons Center, Tyndall Air Force Base, Florida, for the installation of an automatic radio fire alarm system.

We deny the protests.

Last year, the Air Force attempted to procure the same requirement by sealed bidding under an invitation for bids (IFB) set aside totally for small businesses. Two bidders responded to the IFB. The low bidder was rejected because it did not qualify as a small business; the other bidder's price exceeded the government estimate and was determined to be unreasonable, which resulted in cancellation of the IFB. As a result, the Air Force issued the current solicitation for competitive proposals on an unrestricted basis. The RFP calls for a system which operates with a central transmitter and 134 local transceivers that utilize FM transmission and operate on any assigned frequency range between 132 and 174 megahertz. All equipment in the system is required to meet the installation and operational requirements of National Fire Protection Association (NFPA) Standard 72D.

TLC contends that the Air Force should be soliciting sealed bids instead of competitive proposals, that the procurement should have been set aside exclusively for small businesses, and that the specifications should require that the fire alarm system be approved by Underwriters Laboratory (UL) or Factory Mutual Systems (FMS). TLC also alleges that the Air Force has previously procured similar requirements by sealed bidding. It argues that negotiation on an unrestricted basis is being used to assure award to Monaco Enterprises. Further, TLC contends that the Air Force did not properly consider several letters from small businesses which requested that the procurement be set aside for small businesses.

King-Fisher protests the requirement for compliance with NFPA Standard 72D, and also complains that the RFP specifications include several "incongruities."

The Air Force responds that it used negotiated procedures because it did not expect to receive more than one sealed bid, and it desired to hold discussions so that it could assure that offerors understood the specifications. In the prior procurement, several bidders had questions concerning the specifications.

We find that the Air Force did not act improperly in electing to conduct the procurement using negotiated procedures. Under the Competition in Contracting Act of 1984 (CICA), agencies are required to obtain full and open competition and to use the competitive procedure or combination of competitive procedures considered best suited under the circumstances of the procurement. 10 U.S.C. §§ 2304(a)(1)(A) and (B) (Supp. III 1985). In determining the competitive procedure appropriate under the circumstances, the agency need not solicit sealed bids if, among other factors, it will be necessary to conduct discussions with responding sources about their offers. 10 U.S.C. § 2304(a)(2). The determination whether discussions are necessary for a given procurement essentially involves the exercise of business judgment by the contracting officer. TLC Systems, B-225871, Mar. 17, 1987, 87-1 C.P.D. ¶ 297.

Here, the Air Force's decision not to use sealed bidding is consistent with CICA. The fact that the Air Force may have fulfilled a similar requirement under sealed bidding procedures does not establish that negotiated procedures are inappropriate in this particular procurement. Id. The relevant question is what facts and circumstances prevailed at the time the Air Force made the decision to use negotiated procedures. Here, the Air Force decided to conduct discussions with responding offerors to insure that offerors understand what the agency requires by the specifications. Military Base Management, Inc., B-224115, Dec. 30, 1986, 66 Comp. Gen. ___, 86-2 C.P.D. ¶ 720. In the past, two other sealed bid procurements had to be canceled because of questions by the bidders about the specifications. Under CICA, this decision permits using negotiation.

Regarding the decision not to set aside the procurement for small business, the Air Force reports that while letters from small businesses were evaluated the ultimate decision not to set aside the procurement was based on the prior procurement. The Air Force points out that while 37 small businesses requested a copy of the previous solicitation, only one small business submitted a bid.

The Federal Acquisition Regulation, 48 C.F.R. § 19.502-2 (1987), requires that an acquisition be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small businesses and award will be made at a reasonable price. While other small businesses supported the protester's view that the procurement should have been set aside, the history of the procurement indicated that small businesses were provided the opportunity to bid on the prior

procurement as a set-aside, but that only one small business actually bid, and that bid was rejected because of price. As a result, the Small and Disadvantaged Business Utilization Officer withdrew support for the procurement as a small business set-aside because there was no expectation of award to a small business at a reasonable price. Under these circumstances, we cannot find that the contracting officer abused his discretion in not setting aside the procurement. See TLC Systems, B-225871, supra.

With respect to the allegation that the specifications are defective because they do not require UL or FMS approval, TLC contends that not restricting the alarm system to UL or FMS approval violates Air Force guidelines and, therefore, is restrictive. The Air Force reports that the specification was written to comply with Air Force Occupational Safety and Health (AFOSH) Standard 127-56, which mandates that the fire alarm system conform to NFPA Standard 72D. Standard 72D requires only that the system "be included in a list published by an organization acceptable to the authority having jurisdiction," which is the Air Force. The Air Force states that while UL and FMS are the most well known testing laboratories, Wyle Laboratories, United States Testing Laboratories, and the National Electrical Manufacturers Association are acceptable testing laboratories. The Air Force believes that restricting equipment solely to UL or FMS listed equipment would unduly restrict competition.

We find no merit to TLC's contention that the specifications were required to restrict equipment approval to UL or FMS. We have held that a requirement that items offered bear a specific label demonstrating approval by a particular testing laboratory, without recognizing equivalents is unduly restrictive and improper. Advance Machine Co., B-219766, Nov. 5, 1985, 85-2 C.P.D. ¶ 526. In the absence of a specific law or regulation which requires that the Air Force utilize only UL or FMS approved fire alarm equipment, there is no basis for objecting to the Air Force's decision not to include this requirement. King-Fisher Co., B-209097, July 29, 1983, 83-2 C.P.D. ¶ 150.

Conversely, King-Fisher contends that the requirement that all equipment meet the requirements of Standard 72D is unduly restrictive because UL or FMS certification is, in effect, required, and only one manufacturer--Monaco--has such certification and offers equipment which meets the terms of the RFP. King-Fisher alleges that Standard 72D requires equipment approval from an organization "concerned with product evaluation, that maintains periodic inspection of production of labeled equipment or materials." In this regard, King-Fisher contends that fire alarm equipment must comply with Occupational Safety and Health Administration

(OSHA) regulations, which recognize only UL and FMS as approving organizations. Thus, King-Fisher argues that Standard 72D actually restricts the procurement to only UL and FMS approved fire equipment. King-Fisher asserts that the Air Force could eliminate this restrictiveness by calling for equipment that meets the requirements of NFPA Standard 1221.

The Air Force contends that OSHA regulations do not apply to this procurement. See 29 C.F.R. § 1910.5(b) (1986). Rather, AFOSH Standard 127-56, the governing standard, requires only that the equipment comply with Standard 72D, and does not restrict approval of fire equipment to UL or FMS. Standard 72D applies to proprietary protective signaling systems serving contiguous and non-contiguous properties under one ownership from a central supervising station located at the protected property, while Standard 1221 applies to public fire service communication facilities receiving fire alarms or emergency calls from the public. The Air Force determined that the base falls more properly under 72D.

King-Fisher has not shown that the Air Force use of Standard 72D was unreasonable. While King-Fisher contends that there is an unspecified executive order directing the Air Force to comply with OSHA standards, we are unaware of any such order. We specifically considered the question of whether OSHA regulations govern the purchase of military radio fire alarm equipment in King-Fisher Co., B-209097, supra, and held that there was insufficient evidence to conclude that OSHA regulations apply. Thus, the RFP contains no implied requirement for only UL or FMS approval.

Regarding the Air Force's decision to use Standard 72D instead of Standard 1221, King-Fisher raises essentially the same arguments that were previously considered in King-Fisher, B-209097, supra. The Air Force has justified its decision to use Standard 72D for a military installation here on the same ground as did the Army in that decision, that is, that the installation is more analogous to a large private facility than to one receiving calls from the general public. We specifically held that this determination is not unreasonable. Id.

King-Fisher also protests a number of specification details which it alleges contain "incongruities." In view of the Air Force decision to amend the specifications to address

the specific incongruities raised by King-Fisher, we find this aspect of its protest academic. See American Contract Services, Inc., B-225182, Feb. 24, 1987, 87-1 C.P.D. ¶ 203.

The protests are denied.

for James F. Hinchman
General Counsel